process "shall hold the premises therein conveyed with all their appurtenances, as fully and amply, and for such estate and estates, and under such rents and services, as he or they, for whose debt, or duty, the same shall be sold, might or could do, at or before the taking thereof in execution." REV. CODE (1893), ch. 111, § 27.

In *Hazzard* v. *Hazzard,* 5 Boyce—, 94 Atl. 905 (1915), noted in 15 COLUMBIA L. REV., 618, lands devised in fee tail, with remainder over, were sold on execution on judgment against the tenant in tail and sheriff's deed given therefor. After death of the execution debtor, the remainderman sued in ejectment to recover possession from the grantee of the grantee in the sheriff's deed. The court held, under the provisions of the statutes above referred to, that the grantee in the sheriff's deed took a fee simple. The court concluded that, under the statutory provision above quoted, the purchaser took such *estate or estates as the debtor might or could convey.* The Supreme Court of Delaware has now reversed that judgment, holding that the purchaser at execution sale gets only an estate for the life of the tenant in tail. *Hazzard* v. *Hazzard,* 97 Atl. 233 (1916).

The conclusion of the court is supported by *Elliott* v. *Pearsoll,* 8 Watts & S., 38 (1844), PURDON'S DIGEST (1818), 199, containing a provision similar to the Delaware statute, and the construction of the statute would seem to be sound despite the unfortunate results. Under this decision there is available in Delaware a very effective means of keeping land out of the reach of creditors, except for the limited interest as appears above, a means almost as effective and pernicious as the tenancy by entireties, at least as the same is worked out in Michigan.

Another interesting case showing that the often supposed obsolete estate tail is still of very considerable importance is *Dungan* v. *Kline,* 81 Oh. St. 371, 90 N. E. 938 (1910), from which it appears how land in Ohio may be entailed for one generation. R. W. A.

TAKING OF EQUITABLE EASEMENTS FOR PUBLIC USE.—The case of *Flynn* v. *New York &c Railway Co.,* decided by the Court of Appeals of New York in April last, involves the right of an owner of land to which is appurtenant a so-called equitable easement, arising under a covenant restricting the use of other land, to compensation upon the taking of the servient land for a public use inconsistent with the restriction. A tract of land was laid out in accordance with a plan, and all lots therein were sold and conveyed by deeds containing covenants, *inter alia,* that, "No building or structure for any business purpose whatsoever shall be erected on said premises." The appellant railway company purchased thirty-eight of these lots from the grantees of the original owner, subject to the restrictions, and built its railway across them, partly on an embankment and partly in a cut. Respondents owned lots in this tract, some adjacent to appellant's lots, some across the street from them. The maintenance and operation of the railway rendered respondents' property less valuable than it would be if the appellant's property were used exclusively for residence purposes. The

respondents sued to enjoin the construction and operation of the railway across appellant's lots. The judgment appealed from restrains the maintenance of appellant's structures (the railway was completed and in operation before the trial), and the operation of the road, unless appellant pays respondents the certain sums which are assessed as damages, measured by the depreciation in value which their lands sustain, not only by reason of the existence of the appellant's structures but also by reason of the use to which they are put. (As to the assessment of compensation in the injunction suit, see LEWIS, EMINENT DOMAIN (3d. Ed.) § 892). This judgment is affirmed by a unanimous court. POUND, J., delivering the opinion, says, "These restrictive covenants create a property right and make direct and compensational the damages which otherwise would be consequential and non-compensational. No matter how unpleasant a neighbor the railroad may prove, if it takes no property by physical appropriation it is not chargeable with damages for impaired values due only to proximity. But something in the nature of an easement of privacy over another's land may be acquired by covenant in order that one may live apart from the disagreeable sights and sounds of business if one desires, and if that right has a value and the railroad subtracts a portion thereof by building on the restricted land, it is difficult to conceive why compensation should not follow."

There have been other decisions of the same import, (See *Long Eaton Co.* v. *Midland Railway Co.*, [1902] 2 K. B. 574; *Ladd* v. *City of Boston*, 151 Mass. 585; *Allen* v. *City of Detroit*, 167 Mich. 464), but the case appears to be of first impression in New York, and, as none of the foregoing cases are cited by the court, the conclusion appears to have been reached by independent reasoning.

The broad construction given in the principal case to the covenant that no "building or structure" for business purposes "shall be erected on" said premises, as prohibiting the construction of the railroad, "whether above, on or below the surface of the ground," seems quite sound, and is supported by *Long Eaton Co.* v. *Midland Railway Co., supra.* The case of *United States* v. *Certain Lands*, 112 Fed. 662; affirmed in 153 Fed. 876, cited in the principal case as suggesting a distinction between infringement of a covenant by private act and infringement by public act, went off finally on the construction of the covenant prohibiting "noxious, dangerous or offensive trade or business," as not inconsistent with the use of the land for fortification and coast defense. Its only relation to the principal case, then, is that they both involve nice questions of construction.

The principal case and those cited herein as in accord with it tend to support the position that equitable rights in land are rights *in rem*. Like the cases cited to that point by Mr. HUSTON, in his ENFORCEMENT OF DECREES IN EQUITY, they are not conclusive upon this point. The argument proceeds upon the premise that, in order to be entitled to compensation, it is essential that one have "real" rights in the land which is physically taken. But it may be said that this premise is unsound: that it is enough that one receives an injury in respect of other land in which he has such rights, against which he would have a remedy if it were the result

of a private use. This position raises a large question upon which the authorities are not in harmony, and upon which the phraseology of constitutions and statutes has an important bearing. LEWIS, EMINENT DOMAIN, § § 62-68. The cases in New York, though not free from doubt, give much support to the narrow doctrine quoted above from the principal case. *Story* v. *N. Y. El. R. Co.*, 90 N. Y. 122; *Uline* v. *N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Lahr* v. *Met. El. R. Co.*, 104 N. Y. 268. But, granting that the broader position might have furnished adequate ground for these cases, the theory upon which they were put by the courts which decided them is that the covenantee had property rights in the land of the covenantor, which are taken by a use inconsistent with the covenant. These cases thus stand alongside of *In re Nisbet and Pott's Contract,* [1905] 1 Ch. 391; [1906] 1 Ch. 386, as establishing the "real" character of equitable easements. And, if it be conceded that these are rights *in rem,* it is extremely difficult to differentiate any of the other equitable interests. E. N. D.

PUBLIC OPINION AND JUDICIAL OPINION.—The day is not yet past when we hear the clamor for recall of judicial decisions or other like measures of popular control of judicial opinion. Nor will the day pass when politicians can single out a particular decision and with it "prove" that the courts are reactionary. We may, therefore, now and then expect proposals for the restriction of judicial independence; and a few words on the actual attitude of the courts will not be out of place.

Most of the criticism is of course directed to the practice of the courts in declaring void social legislation, and especially that dealing with labor problems. That much of this criticism is justified has been the opinion of writers in this and other legal periodicals. See 13 MICH. L. REV., 497; 29 HARV. L. REV., 353. But while criticism may be just, it does not necessarily lead to the conclusion that courts need be controlled directly by popular vote. For much that such a proposal is intended to do is already accomplished in a more effective and less ponderous way.

No observer of social facts can escape the feeling that popular opinion as manifested by the ballot is often a mere passing whim, and unfortunately is affected too often by local and personal considerations. The "dear people" are capricious. An election is not necessarily an accurate barometer of public opinion. There are other ways in which it makes itself felt, through the press, the forum, discussion, and through every other type of communication. It is impossible to suppose that lawyers and judges, participating in public affairs and in touch constantly with public opinion, will be unaffected. They are only human and their ideas will change under pressure of their neighbors' views. This is a result always to be expected in human institutions. A few cases will illustrate what is meant.

In 1895 the supreme court of Illinois was called upon to decide upon the constitutionality of a law limiting to eight hours a day the time during which women, employed in factories and workshops, might labor. It regarded this law as a "purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties. It sub-